

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY ROSENCRANTZ,

Defendant-Appellant.

UNPUBLISHED

August 18, 1998

No. 197313

Genesee Circuit Court

LC No. 95-052884 FC

Before: Hoekstra, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, as charged, of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and felonious assault, MCL 750.82; MSA 28.277, for holding a knife to the throat of the complainant in this case and forcing the complainant to perform oral sex on him. As enhanced by the second habitual offender statute, MCL 769.10; MSA 28.1082, the sentences imposed for the first-degree criminal sexual conduct conviction were 22-1/2 to fifty years' imprisonment and three to six years' imprisonment for the felonious assault conviction, to be served concurrently. We affirm defendant's conviction and sentence for the criminal sexual conduct conviction but vacate defendant's conviction and sentence for the felonious assault conviction.

I

Defendant's conviction of felonious assault must be reversed and the sentence for this conviction vacated because the trial court erred in its instruction to the jury as to the requisite intent for felonious assault, and such error was not harmless. Although defendant did not object to the instructions at issue, relief is granted to avoid a miscarriage of justice. MCL 769.26; MSA 28.1096. Defendant is correct that felonious assault is a specific intent crime requiring either an intent to injure or an intent to put the victim in reasonable fear or apprehension of a battery. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); *People v Rivera*, 120 Mich App 50, 54; 327 NW2d 386 (1982); CJI2d 17.9, Commentary. The jury must be instructed on all elements of the charged offense, and the failure to so instruct requires reversal, *People v Butler*, 413 Mich 377, 386-390; 319 NW2d 540 (1982); *People v Daniel*, 207 Mich App

47, 53; 523 NW2d 830 (1994), unless

the instructional error is harmless, *People v Vaughn*, 447 Mich 217, 235-238; 524 NW2d 217 (1994); *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994). Because the jury in this case was not instructed that defendant must have an intent to injure or to put the victim in fear, and such error was not harmless, reversal of defendant's felonious assault conviction and vacation of that sentence is mandated. *Joeseype Johnson, supra*; *Rivera, supra*; *People v Korona*, 119 Mich App 369, 370-371; 326 NW2d 143 (1982).

We will address the remainder of defendant's claims, although none of the remaining issues merit relief.

II

Defendant asserts that there were numerous instances of prosecutorial misconduct that require reversal. We disagree.

A

Defendant argues that the prosecutor improperly appealed to the jury's sympathy, disparaged the defense and denigrated defense counsel, vouched for the credibility of the complainant, and shifted the burden of proof. For the most part, defense counsel failed to object to the complained-of remarks made by the prosecutor. Our review is therefore precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Our failure to review this issue would not result in a miscarriage of justice because a timely instruction to the jury could have cured any prejudicial effect of the prosecutor's comments. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). In any event, the prosecutor did not shift the burden of proof and did not vouch for the credibility of the victim to the effect that he had some special knowledge that the victim was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). With regard to the prosecutor's comments to which trial counsel did object, any potential prejudice was allayed by the trial court's cautionary instructions to the jury or its admonishments to the prosecutor.

B

Next, defendant argues that he was denied a fair trial because the prosecutor failed to identify and list all known *res gestae* witnesses. This issue is not preserved because defendant failed to object at trial or to move for an evidentiary hearing or a new trial on this basis. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Even were we to review this issue, defendant has failed to show that the witnesses named by defendant were actual witnesses to "some event in the continuum of a criminal transaction" and whose testimony would aid in developing the facts. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Defendant has not established that he was denied a fair trial on this basis.

C

Defendant's also asserts that he was denied a fair trial because the prosecutor failed to investigate who owned the vehicle used in the assault on the victim. This issue is waived because it is unpreserved and defendant has failed to cite any authority on point that the prosecutor had a duty to investigate the ownership of the truck. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

D

Finally, defendant claims that the prosecutor committed misconduct by allowing perjured testimony of the victim, wherein she changed her testimony regarding the time of the assault, to stand in front of the jury. However, there is no evidence that the victim committed perjury or that the prosecutor had knowledge of any perjury. Defendant's claim in this regard is without merit. See *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Moreover, the victim's change in testimony presented an opportunity for defense counsel to impeach the victim's credibility, and defendant has failed to show how he was prejudiced by the change in the victim's testimony.

The prosecutor did not engage in prosecutorial misconduct, and defendant was not denied a fair and impartial trial on this basis.

III

Defendant raises numerous grounds of ineffective assistance of counsel. We note that defendant did not move for a *Ginther*¹ hearing below, and this Court denied defendant's motion to remand for a *Ginther* hearing. Therefore, this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish ineffective assistance of counsel a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial, i.e., that absent the errors there is a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145, 164-165, 167; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra*.

A

Defendant argues that his trial counsel should have moved to suppress the victim's pretrial identification of defendant in a photo show-up. However, defendant has not established that the victim's identification of defendant was tainted, that defense counsel would have prevailed on a motion to suppress the identification evidence had such a motion been brought, that counsel's assistance in this regard was deficient or prejudicial to defendant, or that the result of the proceedings would have been different had this evidence been excluded. Defendant has not met his burden. *Mitchell, supra* at 163 n 19; *Stanaway, supra*.

Defendant further argues that trial counsel should have sought to exclude evidence of the fact that defendant had a tattoo on his chest because the tattoo was prejudicially misleading evidence under MRE 403, and in the event of an unfavorable ruling, counsel should have presented evidence to show that the tattoo was not a unique identifying mark. Defendant has not established that evidence of his tattoo was highly prejudicial and inadmissible—any evidence that tends to identify a defendant is going to be prejudicial to that defendant. Further, although defense counsel did not present evidence to show that the tattoo was not a unique identifying mark, defense counsel attempted to impugn the victim’s credibility regarding her identification of the tattoo. Defendant has not demonstrated that his counsel’s performance in this regard was objectively unreasonable. *Strickland, supra*; *Pickens, supra*.

B

Defendant next argues that defense counsel was ineffective because he should have moved for a continuance to present three remaining alibi witnesses. An attorney’s decision whether to call certain witnesses is presumed to be a matter of trial strategy. *Mitchell, supra* at 163. The exception to this rule is when the failure to call the witnesses would deprive the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant was not deprived of a substantial defense where his trial counsel presented an alibi defense on defendant’s behalf through several other witnesses at trial.

C

Defendant asserts that defense counsel should have moved to preclude the victim from testifying to alleged similar acts, specifically her testimony that while defendant held a knife to her throat, he told the victim how he had previously cut, disemboweled, and killed previous victims. We conclude that even if defense counsel had challenged the victim’s testimony in this regard, it is doubtful that defense counsel would have succeeded in having the testimony excluded. Defendant’s statements to the victim regarding the other acts were part of the *res gestae* of the crime. The jury was entitled to hear the “complete story,” including inculpatory statements made by defendant to the victim. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). In addition, the statements by defendant to the victim were relevant regarding whether he intended to make the victim reasonably fear an immediate battery, an element of the felonious assault charge. See *Joeseype Johnson, supra* at 210; CJI2d 17.9. The statements were also relevant as to whether defendant used coercion to accomplish the sexual penetration, one of the alternative bases for the criminal sexual conduct charge. See MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant has not established that defense counsel’s performance was deficient or that defendant was deprived of a fair trial because of counsel’s failure to challenge this other-acts evidence. *Pickens, supra*.

D

Defendant contends that counsel was ineffective for failing to object to testimony by Ellen Rogers that she saw defendant in Michigan in July 1995 and that he was driving a dark pickup truck similar to the one used in the instant offense. Defendant asserts that, but for counsel’s failure to object, the testimony would have been excluded as irrelevant and highly prejudicial to defendant. However, it is

precisely the link to a dark pickup truck and to defendant's presence in Michigan in the area of the instant crime, albeit a month before the crime took place—but at a time when defendant also asserted that he was in Missouri—that establishes the relevancy of the testimony, MRE 401, and supports its admissibility, MRE 402. Again, defendant has not shown that his trial counsel's performance was deficient.

E

Defendant argues that defense counsel should have moved for the production of certain res gestae witnesses. Trial counsel's failure to call witnesses is presumed to be trial strategy. *Strickland, supra* at 689; *Mitchell, supra* at 163, 165-166. Nothing in the record suggests that counsel erred in not calling witnesses who were not present when the victim was assaulted, that these witnesses would have been helpful to defendant's defense, or that their testimony would have had a reasonable probability in affecting the outcome at trial. Defendant has not carried his burden of showing that defense counsel's failure to move to have these witnesses produced was not a matter of sound trial strategy. *Strickland, supra*; *Mitchell, supra*.

Defendant was not denied the effective assistance of counsel.²

IV

Defendant next claims that the trial court abused its discretion in admitting testimony by Christen Byler on rebuttal as to the travel time between Flint and Missouri. Defendant asserts that the witness' testimony about her drive from Missouri to Flint did not meet the "substantial similarity" requirement because there was no showing that the conditions at the time of the witness' drive were substantially similar to those existing at the time of the instant offense.

The evidence introduced by the prosecutor properly responded to evidence presented by defendant regarding the driving distance between Missouri and Flint and responded to the defense raised by defendant that he could not have committed the instant crime and been in Missouri in time to be seen the next morning by his alibi witnesses. See *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). Admission of the rebuttal evidence was within the trial court's discretion, *id.* at 398, and any question as to the exact similarity of the conditions under which Byler made the drive went to the weight, not the admissibility, of the testimony, *Smith v Grange Mut Fire Ins Co of Michigan*, 234 Mich 119, 126-127; 208 NW 145 (1926); *Lopez v General Motors Corp*, 224 Mich App 618, 630; 569 NW2d 861 (1997).

V

Defendant next asserts that the trial court abused its discretion in denying defense counsel's request to present testimony by witness Tamra White, defendant's girlfriend, as surrebuttal to Byler's testimony regarding the travel time between Missouri and Flint and regarding the reason for Byler's separation from the Berry County Sheriff's office, Byler's former employer. Generally, rebuttal evidence must relate to a substantive rather than a collateral matter, *People v Vasher*, 449 Mich 494,

504; 537 NW2d 168 (1995), and the scope of rebuttal is based on the trial judge's discretionary authority to preclude the trial from turning into a trial of secondary issues, *Figgures, supra*. We agree with the trial court that defense counsel knew that time would be an issue in this case and could have presented the information regarding travel time when White first testified. Also, any testimony on surrebuttal regarding the reason for Byler's termination from the sheriff's department was properly excluded because this was a collateral, not a substantive, matter. The trial court did not abuse its discretion in excluding the surrebuttal evidence. *Vasher, supra; Figgures, supra*.

VI

Defendant claims that he was denied his right to a speedy trial as a result of the adjournment of the April 2, 1996 trial date. In determining whether a defendant has been denied his right to a speedy trial, we consider: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978). In this case, both parties were responsible for the delays in the start of trial, with much of the delay attributable to arranging for the production of the out-of-state witnesses. We consider the factor regarding the reasons for the delay to be equally balanced between the parties. Defendant's failure to promptly and formally assert his right to a speedy trial weighs against his claim that he was denied this right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Because the length of the delay was less than eighteen months, defendant must prove prejudice. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Daniel, supra* at 51. Defendant has not demonstrated that he was prejudiced by the delay in his trial, and he has not established that the presentation of his alibi defense was ineffective or prejudicial to him. Defendant's claim is without merit.

VII

Defendant claims that his convictions for both first-degree criminal sexual conduct and felonious assault violate his right against double jeopardy under both the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 15. However, the reversal of defendant's conviction for felonious assault renders this issue moot.

VIII

Defendant maintains that even if certain errors, standing alone, do not require reversal, the cumulative effect of the errors was so prejudicial as to deny him his due process right to a fair trial. Although we agree that instructional error warrants reversal of defendant's felonious assault conviction, we conclude that defendant was not deprived of a fair trial by cumulative error.

IX

Finally, defendant claims that the trial court erred in imposing a sentence and then replacing it with an enhanced sentence an hour later. We first note that the trial court need not determine defendant's habitual offender status at a separate hearing held before the sentencing proceeding but

could, as in this case, make this determination at the sentencing proceeding. MCL 769.13(5); MSA 28.1085(5). In this case, it is clear that the sentencing proceeding was still in progress and that the judgment of sentence had not been signed at the time that the trial judge stated on the record its intention to modify the sentence on the criminal sexual conduct conviction to be an enhanced sentence. The trial court had the authority to make this correction or modification to the sentence. MCR 6.435(B); *People v Bingaman*, 144 Mich App 152, 157-159; 375 NW2d 370 (1984).

X

Defendant's felonious assault conviction is reversed and the sentence for this conviction is vacated. Defendant's conviction and sentence for first-degree criminal sexual conduct are affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Richard A. Bandstra

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Defendant also complains that his counsel failed to object to instructions provided to the jury regarding the felonious assault charge. Because we conclude that defendant's felonious assault conviction must be vacated for the reasons discussed above, we need not consider this claim.